

STATUTE OF LIMITATIONS FOR CONTRACTS HELD CONTROLLING IN AN ACTION ON A PHYSICIAN'S CONTRACT FOR A PARTICULAR RESULT

Noel v. Proud

189 Kan. 6, 367 P.2d 61 (1961)

In an action by a patient against a physician, the Supreme Court of Kansas¹ held that where the petition alleged a breach of an express warranty as the basis of recovery of damages,² a valid cause of action sounding in contract, governed by the three-year contract statute of limitations, is stated. The issue decided was whether the petition stated a good cause of action sounding in contract or one where the gravamen was in tort for malpractice. The statute of limitations would have barred the latter but not the former.³

The plaintiff's petition stated "that defendant undertook to treat plaintiff and agreed to perform such an operation on the hearing structures of each of plaintiff's ears *and at the same time orally agreed and warranted that while the operations might not have any beneficial effect the plaintiff's hearing would not be worsened as a result of the operations . . .* and that in reliance on and in consideration of the defendant's promises and warranties plaintiff agreed to accept defendant's services and to pay the reasonable cost therefor; . . . That as a direct result of the breach of contract by the defendant and the resultant loss of hearing in plaintiff's ears, plaintiff has been damaged. . . ."⁴ The majority cited an 1870 Kansas decision⁵ establishing the rule that a practicing physician or surgeon is not considered as warranting a cure, unless under a special contract for such purpose.⁶ The court carefully distinguished⁷ an action for malpractice, which is based upon warranties and obligations implied by law because of the

¹ Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961).

² The damages in actions upon special contracts between physician and patient are usually limited to those of a contract nature and do not include tort damages such as pain and suffering, etc. Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955). See generally 2 N.Y.L.F. 121 (1956); 31 St. John's L. Rev. 123 (1956); 7 Syracuse L. Rev. 165 (1955). But cf. 21 NACCA L.J. 132 (1961).

³ Kan. Gen. Stat. Ann. § 60-306 (1949).

⁴ Noel v. Proud, *supra* note 1, at 63-64. Note that no allegations of negligence were made concerning the conduct of the appellant-physician.

⁵ Tefft v. Wilcox, 6 Kan. 46 (1870).

⁶ See generally, 41 Am. Jur. *Physicians and Surgeons* § 103 (1942); 70 C.J.S. *Physicians and Surgeons* § 37 (1951); Annot., 27 A.L.R. 1250 (1923).

⁷ In the syllabus the court stated "Malpractice is predicated upon the failure to exercise requisite medical skill and is tortious in nature, while an action in contract is based upon a failure to perform a special agreement. Negligence, the basis of the one, is foreign to the other."

special nature of a *contract of employment* between patient and physician,⁸ from an action upon a *special contract* between patient and physician for a *particular result*.⁹

In an earlier case, *Becker v. Floersch*,¹⁰ the petition alleged that defendant guaranteed to cure a tumorous growth, and the court in discussing the appropriate statute of limitations adopted as dictum this quotation from plaintiff's brief: ". . . [A]s this court has said many times, a malpractice suit is a tort action and this court has swept aside in suits of this type, the question of implied or explicit written or oral contract considerations between patient and doctor."¹¹ Despite the fact that the defendant in the instant case cited the dictum in *Becker* as prevailing authority in Kansas that in patient-physician lawsuits the substance of the action was to prevail over its form,¹² the court held that a cause of action based upon a special contract between physician and patient is controlled by the statute of limitations for contracts not in writing rather than the shorter statute controlling malpractice actions. Thus, as to statute of limitations issues in Kansas, the mandate that the substance of the action (*ex delicto*) prevails over its form (*ex contractu*) is now limited to causes of action brought on an express or implied *contract of employment* for the improper performance by a physician of those duties imposed upon him by reason of the professional services undertaken and not to actions based upon a physician's *special contract* for a *particular result*.¹³

Even when statutes of limitations have been couched in similar language, three different views may be distinguished as to whether an action *ex contractu* by a patient for a breach of duty arising out of a physician's *contract of employment* is governed by the time limitations provided by tort (malpractice) actions or by time limitations provided for contract actions.¹⁴ Irrespective of such conflicting views, the issue presented in *Noel*, whether the contract statute of limitations should apply where the act alleged is a breach of the specific terms of a *contract agreeing to perfect a particular result*, without any reference to legal duties imposed by law in the relationship created thereby, is a separate legal question. The decision in *Noel* gives weight to a growing trend of decisions, but there are cases holding in effect that time limitations provided for tort actions control

⁸ Note that the obligation implied by law, that the physician use the average degree of skill, care and diligence exercised by members of the profession practicing in the same or similar locality, may result from either an express or implied *contract of employment* or from a consensual relationship.

⁹ *Accord*, *Robins v. Finestone*, *supra* note 2; *Calvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.2d 794 (1949). See generally Annot., 80 A.L.R.2d 320, § 7 (1961); Miller, "The Contractual Liability of Physicians and Surgeons," 1953 Wash. U.L.Q. 411.

¹⁰ 153 Kan. 374, 110 P.2d 752 (1941).

¹¹ *Id.* at 376, 110 P.2d at 754.

¹² *Traves v. Bishoff*, 143 Kan. 283, 54 P.2d 955 (1936).

¹³ *Noel v. Proud*, *supra* note 1.

¹⁴ See Annot., 80 A.L.R.2d 323 (1961).

malpractice actions, even though it is alleged in the complaint that the defendant practitioner agreed to effect a cure or warranted that a particular result would be obtained.¹⁵

*Sales v. Tauber*¹⁶ is the only Ohio case which specifically centers upon the issue present in *Noel*. In *Sales* the Common Pleas Court of Hamilton County ruled that an action against a physician for alleged breach of warranty that an operation would leave no permanent after-effects is in reality a suit for malpractice rather than an action for breach of contract, and is barred in one year after the termination of the physician-patient relationship. Yet, upon inspection of the *Sales* opinion, it appears that the court did not address itself to the distinction between an action brought on a physician's duties arising from a contract of employment and an action upon a special contract to perfect a specific result.

The Ohio courts seem to recognize the rule that in the absence of a special contract, a physician or surgeon is not an insurer, guarantor, or warrantor of recovery or a special result.¹⁷ There appears to be no authority in Ohio restricting the making of such a contract by a physician and his patient. Yet, it appears that Ohio Revised Code section 2305.11,¹⁸ the statute of limitations applicable to malpractice actions, would also be applicable to such special contracts for a particular result. In applying an Ohio Supreme Court ruling "that a special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable,"¹⁹ the court in *Cox v. Cartwright*²⁰ ruled that "when the Legislature used the word 'malpractice' . . . , the word was intended to refer to the nature of the subject matter thereof, and not to its form as a matter of remedial procedure; and, whether the action is strictly in tort or for breach of contract, it is nonetheless an action to recover damages for malpractice. . . ."²¹

The Supreme Court of Ohio has apparently approved of the *Cox* ap-

¹⁵ It has been held that a physician's malpractice liability insurance policy may not insure against the breach of a special contract for a particular result. See *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1940), *aff'd*, 286 N.Y. 649, 36 N.E.2d 692 (1941); *McGee v. United States F. & G. Co.*, 53 F.2d 953 (1st Cir. 1931). See generally 10 Brooklyn L. Rev. 411 (1941).

¹⁶ 27 Ohio N.P. (n.s.) 372 (1929).

¹⁷ See *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902); *Craig v. Chambers*, 17 Ohio St. 253 (1867); *Davish v. Arn*, 32 Ohio L. Abs. 646 (Ct. App. 1940); *Morningstar v. Jones*, 31 Ohio L. Abs. 440 (Ct. App. 1940).

¹⁸ Note that while the Ohio statute which controls malpractice cases, Ohio Rev. Code § 2305.11, specifically uses the word *malpractice*, the Kansas statute applicable, G.S. 1949, 60-306 is worded, ". . . an action for injury to the rights of another, not arising on contract. . . ."

¹⁹ *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 50, 97 N.E.2d 549, 550 (1951).

²⁰ 96 Ohio App. 245, 121 N.E.2d 673 (1953).

²¹ *Id.* at 249, 121 N.E.2d at 676.

proach,²² yet in *Corpman v. Boyer*,²³ an action by a husband against a physician for loss of consortium and services of his wife injured by the alleged malpractice of the physician, the court held "that whether or not plaintiff's claim 'grew out' of defendant's malpractice, we conclude that by no stretch of the imagination can plaintiff's cause of action be 'for malpractice'."²⁴ Even though *Corpman*²⁵ permits a cause of action which results from the "subject matter" of a patient-physician relationship to be brought not in one year but rather in four years, the cause of action sued upon is distinct from any cause of action the patient may have had.²⁶

In the *Corpman* and *Klema*²⁷ cases, the Ohio court, even though it extended the limitations period beyond that for "malpractice" in actions based upon professional services rendered by a physician, restricted the principle to cases where the plaintiff's cause of action is separable in the *res judicata* sense from that of the patient. Although the Kansas court, on the theory of special contract, permitted a patient's cause of action to elude the restrictions of the malpractice statute of limitations, it thus appears in Ohio that any cause of action brought against a physician by a plaintiff who was a party to the patient-physician relationship would be barred by the one-year malpractice statute of limitations.²⁸ Such a result seems probable in Ohio even though the Kansas court, when faced with dictum similar in nature to that in *Cox*, distinguished for statute of limitations purposes an action upon a physician's contract for a particular result from an action in tort.

Several policy arguments may be advanced which support the apparent

²² *Klema v. St. Elizabeth's Hosp. of Youngstown*, 170 Ohio St. 519, 521, 166 N.E.2d 765, 767 (1960).

²³ 171 Ohio St. 233, 169 N.E.2d 14 (1960).

²⁴ The issue in *Corpman v. Boyer*, *supra* note 23, was whether Ohio Rev. Code § 2305.11, the malpractice statute of limitations, or Ohio Rev. Code § 2305.09, the four-year period for commencement of certain actions not otherwise limited, was applicable. There was no contention that the action could be based upon any form of contractual relationship.

²⁵ For a case holding that an action for wrongful death allegedly caused by the negligence of the hospital staff anesthetist, which alleged negligent act would have, if death had not ensued, entitled the decedent to maintain an action for malpractice, was governed by the two-year statute of limitations governing actions for malpractice, see *Klema v. St. Elizabeth's Hosp. of Youngstown*, *supra* note 22.

²⁶ Had the wife (patient) in *Corpman* brought an action which resulted in an adverse judgment, the husband's action for injuries to his wife would not have been barred as *res judicata*. See 12 W. Res. L. Rev. 565 (1961); 6 Vill. L. Rev. 422 (1961).

²⁷ *Klema v. St. Elizabeth's Hosp. of Youngstown*, *supra* note 22.

²⁸ In *Andrianos v. Community Traction Co.*, *supra* note 19, the Ohio court recognized but one form of action, known as the civil action, and held that cases from other states which turn upon a distinction in the form of action brought are not pertinent. Note that this reasoning does not apply to causes of action resulting from the patient-physician relationship, but which are separate in the *res judicata* sense from a cause of action brought by the patient.

Ohio position.²⁹ The first, as illustrated by the numerous malpractice statutes, is the strong tendency of many legislatures to cut down the extent of liability of physicians and surgeons. Such a legislative purpose must be expected to carry much weight with the courts. Secondly, it may be reasoned that contracts to heal and cure do not truly belong to the family of mercantile agreements which are the *raison d'être* of the longer period of limitations.³⁰ It can further be asserted that in cases similar to *Noel*, the physician either was careless or gave bad medical advice and thus may have been guilty of that degree of negligence amounting to malpractice.³¹ Despite allegations of warranty, from a practical standpoint such acts as those in *Noel* may not sufficiently differ from those negligent acts (torts) which do not meet the required standard of medical care of the locality to grant them separate contract statute of limitation treatment.³² It would appear to be the intent in enacting statutes of limitation which specifically mention "malpractice" that the statute apply to *all* actions resulting from a physician's conduct which do not meet the requisite standard of medical care in the locality. Thus, if a negligent act is the basis of an action against a physician by his patient, it would appear that the courts in applying an appropriate statute of limitations, should look toward the substance of the action rather than to a mere distinction in the form of the action brought.

²⁹ For a general discussion of statutes of limitation, see Callahan, "Statutes of Limitations Background," 16 Ohio St. L.J. 130 (1955).

³⁰ Miller, *supra* note 9, at 431.

³¹ Noel v. Proud, *supra* note 1, at 67 (separate opinion).

³² Some states have passed statutes of limitations which specifically control all actions by patients against physicians. See, e.g., Ind. Stat. Ann. § 2-627 (Burns 1946).